Supreme Court, U. S.
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80-138

No. .....

In The

Supreme Court of the United States

October, 1980

DEAN VANDERLINDEN, EXECUTOR OF THE ESTATE OF W. F. VANDERLINDEN, DECEASED,

Appellant,

vs.

RICHARD VANDERLINDEN AND RICHARD VANDERLINDEN, EXECUTOR OF THE ESTATE OF AGATHA VANDERLINDEN, DECEASED,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

JURISDICTIONAL STATEMENT

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July 28, 1980

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QUESTION PRESENTED

Whether Section 633.40 and Section 633.389 of the 1971 Code of Iowa violated the due process clause of the Fourteenth Amendment, as applied in the present case, in that:

A. That the Court of Appeals overlooked a fundamental aspect of due process in finding that notice of hearing could be given by means other than writing.

B. That to be consistent with the due process clause, for a valid judgment to be entered under a statute which, by its terms, did not provide for mailed notice, return of service must show actual receipt of notice, not mere mailing thereof, and any judgment entered without such finding is void and subject to collateral attack.

C. The means chosen for attempting to effect service of notice of hearing on an adversary service of notice were not those reasonably calculated under all circumstances to apprise the party to whom notice was to be given of the pendency of the hearing and to afford her an opportunity to present objections.

D. That the Court of Appeals improperly applied the burden of proof of receipt of notice on the party challenging such notice, rather than the party relying on the validity of such notice.

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Appellee.

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ON APPEAL FROM THE SUPREME COURT OF IOWA

—o—

JURISDICTIONAL STATEMENT

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Dean Vanderlinden, the appellant, appeals from the final judgment of the Court of Appeals of Iowa, dated February 26, 1980, holding that notice given pursuant to Section 633.40 of the 1971 Code of Iowa in a guardianship and conservatorship proceeding did not violate the due process of law as required by the Fourteenth Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the Iowa Court of Appeals which was not recorded appears in the Appendix hereto, App. 1 infra.

The opinion of the Supreme Court of Iowa denying a further review which was also not recorded appears in the Appendix hereto, at App. 1 infra.

The ruling of the Iowa District Court for Warren County is not recorded. It is reprinted in the Appendix hereto, at App. 1, infra.

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JURISDICTION

The judgment of the Court of Appeals of Iowa, reversing a summary judgment entered by the trial court in favor of the appellant, and granting a Motion For Summary Judgment in favor of the defendant, and thus dismissing the appellant's Petition For Declaratory Judgment was entered on February 26, 1980. See App. 1 infra. A Motion For Further Review by the Iowa Supreme Court was entertained and denied on May 2, 1980. See App. 1 infra.

A Motion Of Appeal to this Court was duly filed in the Supreme Court of Iowa on May 29, 1980. See App. 1 infra.

This appeal is being docketed in this Court within ninety (90) days of the denial of the hearing below. The jurisdiction of this Court is invoked under 20 U. S. C. Sec. 1257 (2).

In the event the Court does not consider an appeal a proper mode for review, appellant requests that the papers whereupon this appeal is taken be regarded and looked

upon as a Petition For Writ Of Certiorari pursuant to 28 U. S. C. Sec. 2103.

CONSTITUTIONAL PROVISIONS AND RULES

Fourteenth Amendment, United States Constitution:

> "nor shall any state deprive any person of life, liberty or property without due process of law."

Section 633.40, 1971 Code of Iowa. *"Notice In Probate Proceedings.*

1. *Court prescribing notice.* Except as otherwise provided in this Code, the court shall fix the time and place of hearing on any matter requiring notice and shall prescribe the time and manner of service of the notice of such hearing.
2. *Notice by publication.* In the case of proceedings against unknown persons or persons whose address or whereabouts are unknown, the court shall prescribe that notice may be served by publication within the time and in the manner provided by the Rules of Civil Procedure.
3. *No notice by posting.* No notice shall be served at any time by posting."

Section 633.389, 1971 Code of Iowa. *"Notice and hearing on sale, mortgage, exchange, pledge or lease of property.*

> Upon the filing of the petition, the court shall fix the time and place of hearing of the petition, and prescribe the time and manner of service of the notice of such hearing on all persons interested in such property, provided, however, that as to personal property and as to the lease of real property not specifically de-

vised, for a period of not to exceed one year, the court may, in its discretion, hear the petition without notice. In those instances where notice is required, the notice shall state briefly the nature of the application. At the hearing and upon satisfactory proof, the court may order the sale, mortgage, exchange, pledge or lease of the property described, or any part thereof, at such price and upon such terms and conditions as the court may authorize. For the purposes of this section, the term 'all persons interested' shall include only distributees in the estate and persons who have requested notice as provided by this Code."

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RAISING THE FEDERAL QUESTION

The appellant raised the question of violation of procedural due process of law under the Fourteenth Amendment of the United States Constitution in its Motion For Summary Judgment which was filed on December 12, 1978, and heard on January 12, 1979. The trial Court, in its opinion filed on February 6, 1979, found that the attempted notice was insufficient to meet due process requirements. See Trial Court Opinion App. 1 infra.

This ruling was appealed to the Iowa Supreme Court which assigned the case for hearing before the Iowa Court of Appeals. In his brief and argument, appellant reiterated the due process standards. See Court of Appeals Opinion, App. 1 infra. The Court of Appeals' opinion of February 26, 1980, was affirmed without comment by the Iowa Supreme Court which overruled appellant's Application For Further Review on May 2, 1980. The due process contentions as well as an argument on the necessity

of written notice and the inapplicability of the presumption of receipt of ordinary mail were included in the Application For Further Review. Thus, the Appellate Courts of Iowa considered and expressly rejected this Federal Constitutional claim.

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STATEMENT OF THE CASE

Appellant and Appellee are brothers. Their parents, W. F. and Della Vanderlinden, are both deceased. On February 23, 1966, W. F. and Della Vanderlinden executed identical Wills in each other's presence in the office of Attorney Mason D. Ouderkirk in Indianola, Iowa. In Article III of her Will, Della Vanderlinden specified that in the event her husband did not survive her, all of her property should be liquidated and given in equal shares to her children or their survivors. At the time of her death, there were eight surviving children and one grandchild of a predeceased child.

In the Spring of 1972, Della Vanderlinden was 79 years old and had severe health problems affecting her physical, but not her mental, abilities. Section 633.636 of the 1971 Code of Iowa stated that: "The appointment of a guardian or conservator shall not constitute an adjudication that the ward is of unsound mind." A voluntary petition for a conservatorship and guardianship of her was prepared by Attorney Mason D. Ouderkirk and filed in the probate division of Warren County, Iowa, District Court, as probate No. 10871. All actions in this proceeding will be referred to as in the Probate Court. The peti-

tion requested that W. F. Vanderlinden be appointed as guardian and conservator.

At this time Della Vanderlinden owned a 205-acre farm. She and her husband, W. F. Vanderlinden, lived in the small town of Milo, Iowa. Their mail was received at a post office box located in the Milo, Iowa, Post Office. The appellee stated in his deposition that in 1972, because of her illness, Della Vanderlinden seldom ventured from the family home. The family automobile had been driven only by W. F. Vanderlinden for several years. W. F. Vanderlinden performed family errands such as picking up the mail and shopping; and when accompanied by his wife, she seldom ventured from their automobile. This was admitted by appellee in answers to Request For Admissions and in his deposition.

On April 27, 1972, an application was filed to sell the 205-acre farm in the conservatorship proceedings. At the same time, a request was filed that Phil Watson, an attorney at law who lived in Indianola, but practiced in Des Moines, be named as Guardian ad Litem for Della Vanderlinden. Mr. Watson testified in the hearing for summary judgment held on January 12, 1979. The trial court summarized his testimony by noting at App. 1 infra:

> "Mr. Watson testified January 12, 1979, that he did examine the return of service, that he did not attempt to learn if Della Vanderlinden had received the notice of hearing, and had no knowledge that she did, in fact, receive same; that he never talked to Della Vanderlinden and the answer he signed was prepared by Mason D. Ouderkirk, attorney for the conservator."

Section 633.389 of the 1971 Code of Iowa governed the sale of property by a personal representative and pro-

vided for notice of such proceedings. Section 633.652 of the 1971 Code of Iowa made this section applicable to sales of property in conservatorships. At the time such notice was given, Section 633.40 of the Iowa Code did not specifically provide for service of notice by ordinary mail. A provision allowing notice by mail was passed in Chapter 1128 of the laws of the 64th General Assembly, 2nd Session. It did not become effective until July 1, 1972. It added a provision which allowed mailed notice and providing that service would be complete upon mailing.

The Answer of the Guardian ad Litem, prepared by Mr. Ouderkirk, was filed on May 8, 1972. A report of appraisers appointed pursuant to court Order was filed on May 8, 1972. It set the fair market value of the property at $98,400.00. Della Vanderlinden did not attend the May 8, 1972, hearing.

The Probate Court, in an Order entered June 6, 1972, authorized the conservator to sell the property to Richard and Agatha Vanderlinden on June 8, 1972. The Probate Court Order entered then made no finding that Della Vanderlinden had received actual notice of the May 8 hearing. A report of sale was filed on June 9, 1972, and the matter was set for hearing on June 13, 1972. Notice of such hearing was allegedly made by ordinary mail to Della Vanderlinden at Post Office Box 6, Milo, Iowa, mailed on June 9, 1972. Della Vanderlinden did not attend the June 13 hearing.

Affidavits relating to giving notice to Della Vanderlinden were filed on June 14, 1972. One affidavit purportedly was made on April 28, 1972, the other on June

9, 1972. However, an examination of both originals, and indeed even the copies, shows that on the April 28 affidavit, what appears to be the June 9 date has been erased and the April 28 date has been typed in its place. Such alteration was raised in the trial court, the Court of Appeals and in the Application For Further Review. A separate application was made to the Iowa Supreme Court to have the originals of such affidavits considered by the Supreme Court in ruling on the Application For Further Review. It was overruled summarily by a single Justice assigned to hear the matter in accord with Iowa Appellate Practice.

The sale, which was approved on June 13, 1972, provided for the sale of the property to Richard and Agatha Vanderlinden was for $100,000.00, with $29,750.00 to be paid down, and the balance of $1,500.00 on March 1, 1973, and the sum of $1,500.00 on the 1st day of March of each year thereafter until fully paid with deferred payments to draw six (6) per cent interest, payable annually, after March 1, 1972. The trial court noted in its opinion that:

> "The terms of the contract, on its face, are contrary to the ward's best interests, as well as her testamentary intent. It would tie up the majority of her assets for a period of over forty years at a time when she might need all she owned for medical and nursing home care." See Trial Court opinion at App. 1 infra.

The Will of Della Vanderlinden was not delivered to the Court at the time the conservatorship proceeding was opened as was required by Code Section 633.643 of the 1971 Code of Iowa, as follows:

> "When an instrument purporting to be the will of the ward comes into the hands of a conservator, the conservator shall immediately deliver it to the Court."

As stated previously, W. F. Vanderlinden and Mason Ouderkirk knew of her Will and its contents. Section 633.644 of the 1971 Code of Iowa provided:

> "Upon receiving an instrument purporting to be the will of a living ward under the provisions of Section 633.643, the court may open said will and read it. The court with or without notice, as it may determine, may enter such orders in the conservatorship as it deems advisable for the proper administration of the conservatorship in light of the expressed testamentary intend of the ward."

Appellant alleged in its Motion For Summary Judgment that such action constituted fraud under its contention that in the Will, Della Vanderlinden expressed a wish to treat all of her children equally. There were six other children surviving her in addition to Richard and Dean Vanderlinden and one child had reached adulthood and died before Della Vanderlinden.

Della Vanerlinden died on June 25, 1972, and her Will which was admitted to probate did provide that her property would pass to her husband, W. F. Vanderlinden in the event he survived her. W. F. Vanderlinden died on October 30, 1972. None of the children, other than Richard, including the appellant, knew of the sale of the farm until the Estate of W. F. Vanderlinden was being probated.

The probate action from which this appeal results was filed on November 11, 1973, by the appellant to void the real estate contract entered into by W. F. Vanderlinden as Conservator, and Richard and Agatha Vanderlinden. The Motion to Dismiss based on a collateral attack ground was filed by the appellee on November 14, 1973; and subsequent thereto, appellant filed an amended petition on Feb-

ruary 21, 1974, and appellee filed another Motion to Dismiss on March 4, 1974. This motion was sustained in the Warren County Court on April 3, 1973. Notice of appeal from this dismissal was filed on May 1, 1974, and a *per curiam* decision reversing the same was entered by the Iowa Supreme Court on January 13, 1977.

Subsequent thereto, on August 31, 1978, the appellee filed their answer to appellant's petition. After the answer was filed, both parties conducted discovery. The appellant took the deposition of M. G. Ouderkirk and of Richard Vanderlinden and also directed interrogatories to Richard Vanderlinden and Request For Admission. Based on such discovery, appellant filed a Motion For Summary Judgment on December 6, 1978, alleging that the order approving the sale in the conservatorship proceeding was void because there was no court finding in the record that service had ever been made on Della Vanderlinden and that the notice purportedly given to her did not meet standards of due process of law under the Fourteenth Amendment to the United States Constitution. A resistance to said motion was filed on December 11, 1978.

The appellant also filed motions for adjudication of law points and for judgment on the pleadings on December 6, 1978. The appellee filed his own Motion For Summary Judgment based on the collateral attack argument which they had previously raised in a Motion to Dismiss on December 12, 1978, and the appellant filed their resistance to the same on December 20, 1978.

All motions filed were set for hearing on January 12, 1979; and at the time of hearing, testimony was taken from Phil Watson, previously identified as the Guardian

ad Litem in the Della Vanderlinden Conservatorship. Oral arguments were taken and Briefs were submitted to the Court; and the ruling of the trial court was made on February 6, 1979. The trial court relied on *Mullane v. Central Hanover Bank and Trust Company,* 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and *In Re Estate of Lemke,* 216 N. W. 2d 186 (Io. a 1974), which had been cited by appellant, to define what due process demanded.

The trial court summarized the facts which it found to show a denial of due process in providing notice to Della Vanderlinden as follows:

> "In the instant case, the Order provided for notice by ordinary mail five days prior to the hearing on the application to sell real estate, to be mailed to the ward at Box 6, Milo, Iowa. The ward and conservator were a husband and wife living together and receiving mail at the same box. Della Vanderlinden was not driving a car, she did not leave home after surgery in March because she was self-conscious about the colostomy bag; and if she went with her husband, she would not have gotten out of the car for any errands, such as picking up the mail. These facts appear in the sworn deposition of the defendant, and are not disputed. Further, there is no evidence that the ward actually received the mailed notice. Even if received, the ward could hardly be expected to prepare a defense in five days in view of all the circumstances. It is the opinion of the Court that the attempted notice in this case is inconsistent to meet due process requirements and that the Probate Court was without jurisdiction to approve or authorize the contract of sale, 'Exhibit A', and that the said contract was void and without legal effect." Opinion, Trial Court, App. 1 infra.

In its opinion, the trial court also relied upon the Iowa Supreme Court decision of *Flanders v. Waterloo*

Community School District, 217 N. W. 2d 579, 582 (Iowa 1974) with regard to the question of whether the record of affidavit of mailing with the Court finding of service having been made on Della Vanderlinden, quoting the following language therefrom:

> "The general rule is that when a statute or other provision does not expressly authorize notice by publication, mail, or some other specified method, but requires a person to notify in writing or give written notice, then the method of transmitting the writing to the recipient is not important but receipt of the writing by the one to be notified is essential." Opinion, Trial Court, App. 1 infra.

The Court of Appeals reversed by distinguishing both the *Flanders,* supra, and *Lemke,* supra, decisions. With regard to *Flanders,* the court noted that:

> "The trial court interpreted the case of *Flanders v. Waterloo Community School District,* 217 N. W. 2d 579 (Iowa 1974) as requiring proof of notice when notice was mailed. However, *Flanders* stated that proof of receipt of notice is crucial whenever the statute 'requires a person to notify in writing or to give written notice'. *Id.* at 582. Section 633.40, the Code of Iowa, 1971, did not require the notice to be given in writing, since it gave the court full discretion to determine the manner of service of the notice. That the notice here was, in fact, given in writing does not automatically require invocation of the general rule stated in *Flanders,* since written notice was not the manner necessarily prescribed by the statute." (Opinion, Court of Appeals, App. 1 infra).

The Court of Appeals also applied the presumption of receipt of mailed notice if it was properly addressed and otherwise conforming to postal laws and regulations regarding postage. The court was of the opinion that ap-

pellant should have rebutted this presumption by asserting that notice was not received.

The *Lemke* decision was distinguished, in that, it involved a ten day notice mailed from Iowa to a resident of Texas. It also noted that a Guardian ad Litem had been appointed to represent Della Vanderlinden. Nothing was said about the adverse relationship of the parties and their common address. The fact that the Guardian ad Litem never contacted Della Vanderlinden or that she even knew of his appointment, and the physical infirmity of Della Vanderlinden was noted in the opinion. All of these factors were urged by appellant to the trial court and utilized in its findings. They were also restated in the application for Further Review to the Supreme Court in challenging the failure of the purported notice to meet due process standards.

The Court of Appeals also sustained the Motion For Summary Judgment which had been made by Appellee which asserted that appellant's petition should be dismissed as a collateral attack. Appellant had previously urged that its action should be permitted under the alternative bases of its attack on matters constituting extrinsic fraud or that if a finding of lack of proof of notice and insufficiency was made, that a collateral attack could be mounted because the Probate Court Orders were void for lack of jurisdiction.

In its Application For Further Review, the appellant reiterated for the third time its due process contentions based on *Mullane,* supra, and subsequent due process cases decided by this court; specifically, *Robinson v. Hanrahan,* 409 U. S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972) and *Covey*

v. Town of Somers, 35 U. S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956). The last two cases were cited because it was appellant's contention that compliance with a statute is insufficient in meeting due process standards, knows of peculiar circumstances which will make such compliance a mere gesture, rather than actually expressing a party of the notice which he or she is to be given.

Appellant, in its Application For Further Review, challenged the Court of Appeals's view of notice in writing not being necessary and stated its application of the presumption of mailing to this case was improper.

With regard to the collateral attack dismissal, appellant again urged that the Probate Orders could be challenged as void for lack of jurisdiction based on no showing of actual notice being received by the ward and also on the grounds of extrinsic fraud. The case of *United States v. Throckmorton*, 98 U. S. 61, 65-66, 8 Otto 61, 65-66, 25 L. Ed. 93, 95 (1878) was urged with regard to appellant's argument of the lack of notice constituting fraud.

On May 2, 1980, the Application For Further Review was overruled without comment by the Iowa Supreme Court.

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THE QUESTION IS SUBSTANTIAL

As construed by Iowa's Court of Appeals, Sections 633.40 and 633.389 of the 1971 Code of Iowa permit valid judgments to be entered without the following requirements of due process of law being observed:

(1) Written notice of a hearing being given.

(2) Proof of Receipt of Notice on the party to be served as a jurisdictional requirement.

(3) Use of notice reasonably calculated under all the circumstances to apprise the party to whom notice is to be given of the pendency of the hearing and of the opportunity to defend.

(4) Necessity of a party relying on the validity of purported service proving such service.

Each of these elements standing alone raises serious due process questions; but when taken together, present an even more significant case for noting jurisdiction.

I.

Construction by the Iowa Court of Appeals of the meaning of the word "notice" as it appears in Sections 633.40 and 633.389 of the 1971 Code of Iowa violated the Fourteenth Amendment, Due Process Clause, requiring written notice of a hearing.

Even before the Fourteenth Amendment was adopted, this Court noted the importance of the due process requirements of notice and a right to a hearing as being prerequisites for the entry of a valid judgment being based on the general law of the land. *Hollingsworth v. Barbour,* 29 U. S. 466, 4 Pet. 466, 7 L. Ed. 922 (1830).

The question of what will meet the due process requirements of the Fourteenth Amendment is one that frequently has been before this Court. In recent years, the landmark case in the area of legal notices meeting due process requirements is *Mullane v. Central Hanover Bank*

and Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). It has been cited many times by this Court, as well as by the lower Federal courts and the Appellate Courts of the states, including Iowa. One of the factors that *Mullane* makes clear is that "notice" means written notice. The cases which have been decided since *Mullane* have not dealt with any challenge to the concept of notice being written, rather they have dealt with whether the *method* of communicating such notice, such as mailing, publication or posting, is an adequate substitute for personal service of notice, considering the particular factual circumstances involved.

The Iowa Court of Appeals, in its opinion, noted that:

> "Section 633.40, The Code 1971, did not require the notice to be given in writing, since it gave the court full discretion to determine the manner of service of the notice. That the notice here was, in fact, given in writing does not automatically require invocation of the general rule stated in *Flanders,* since written notice was not the manner necessarily prescribed by the state." (Opinion, Court of Appeals, App. 1 infra).

This construction surely violates Due Process grounds. Such a holding would seemingly permit the giving of casual notice of a hearing, which this Court has stated cannot be a substitute for the due process of law required by the Fourteenth Amendment. *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 355 S. Ct. 625, 59 L. Ed. 1027 (1915). It is a substantial question, in that, there is a wide variety of other Iowa statutes in which the word "notice" is used without any specification that written notice is prescribed. The word "notice" is indeed used 1499 times in various sections of the Code of Iowa. Seemingly, such holding

means written notice is no longer needed in Iowa unless the statute clearly prescribes the same.

Appellant had relied on previous Iowa decisions in challenging the conclusion in his memorandum supporting his application for further review by the Iowa Supreme Court. *State v. Hansen,* 244 Iowa 144, 147, 55 N. W. 2d 923, 925 (1952) clearly sets forth a holding contrary to that of the Court of Appeals:

> "When the statutory requirement is that a notice shall be served, and there is no further specific direction in the statute, two things are clearly implied: (1) that the notice shall be in writing and (2) that it shall be served personally upon the party upon whom service is to be made. We find no Iowa case holding to the contrary."

The courts of Iowa had, in fact, held that the word "notify" or "notifying" can only mean an act in writing when applied to official acts. *Moore v. Marshalltown Opera House,* 81 Iowa 45, 46 N. W. 780 (1890).

Section 633.40 (1) clearly refers to *service* of notice, and when read with the *Hansen* opinion, supra, written notice would seem to be inferred. Moreover, Section 633.34 of the 1971 Code of Iowa provided that all actions triable in probate shall be governed by the Rules of Civil Procedure, except as provided otherwise in the Code. Interestingly enough, if the Court of Appeals' construction is followed consistently, original notices, in Iowa, need not be in writing since Rule 50 of the Iowa Rules of Civil Procedure prescribing their content never explicitly mentions that they are to be in writing.

It seems likely that the Court of Appeals has confused the concept of the manner of service of notice with the

requirement that legal notice is always to be in writing. However, the language of the opinion clearly indicates that notice of a court proceeding need not now be given in writing.

II.

The Court of Appeals erred in holding that for valid service to be made upon Della Vanderlinden, an affidavit of mailing rather than a proof of receipt of service was sufficient.

This court has noted "no judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." *Scott v. McNeal,* 154 U. S. 34, 45-46, 14 S. Ct. 1108, 1112, 38 L. Ed. 896, 901 (1894). Moreover, entry of judgment without notice may be a denial of due process, even where there is jurisdiction over the person and subject matter. *American Surety Co. v. Baldwin,* 287 U. S. 56, 53 S. Ct. 98, 77 L. Ed. 231 (1932). "Due Process" forbids any exercise of judicial power substantially affecting a defendant's rights without notice. *Griffin v. Griffin,* 327 U. S. 220, 60 S. Ct. 556, 90 L. Ed. 635 (1946). Surely the sale of the bulk of her estate would have substantially affected Della Vanderlinden.

Appellant urged that without such a finding that the decrees which were entered in the conservatorship proceeding would be void. In arguing its Motion For Summary Judgment, it advanced the holding of *Flanders v. Waterloo Community School District,* 217 N. W. 2d 579 (1974). The trial court relied on *Flanders* in finding the

June 6, 1972, order void by noting the following quotation from 582 of 217 N. W. 2d:

> "The general rule is that when a statute or other provision does not expressly authorize notice by publication, mail or some specified method, but requires a person to notify in writing or give written notice, then the method of transmitting the writing to the recipient is not important but receipt of the writing by the one to be notified is essential."

In reversing this ruling, the Court of Appeals also went against *Gray v. Lukowski,* 241 N. W. 2d 35 (Iowa 1976), stating that a court cannot make a finding of jurisdiction unless a proper return of service is received and *In Re Estate of Roedell,* 253 Iowa 438, 443, 112 N. W. 2d 842, 845 (1962) holding that a judgment obtained without substantial compliance with the laws of service of process is void.

III.

Notice by ordinary mail to persons such as Della Vanderlinden under Sections 633.40 and 633.389 does not meet the test of due process of law demanded by Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

At the time the conservatorship proceedings relating to Della Vanderlinden were undertaken, no provision was made for mailing of notices in Section 633.40 or Section 633.389. Section 633.40 was amended to allow mailed notice, but such amendment was not effective until July 1, 1972. The section did use the term "manner of service of such hearing" and appellant urged that when such word is used as it relates to service of notice, it must be under-

stood in accord with the peculiar and appropriate meaning given to "'service of original notices', in the absence of anything to the contrary appearing." *State v. Hansen,* 244 Iowa 145, 147, 55 N. W. 2d 923, 924. Della Vanderlinden was entitled to personal service of notice, as she was not mentally incompetent because of the conservatorship proceeding by virtue of Iowa Code Section 633.636 which stated:

> "The appointment of a guardian or conservator shall not constitute an adjudication that the ward is of unsound mind."

Moreover, the parties do not dispute her mental faculties.

The proceeding to sell a ward's property is one that is adversary in nature, which would have also entitled Della Vanderlinden to notice. *Washburn v. Carmichael,* 32 Iowa 475 (1871). Indeed, in that case, it was specifically noted that a guardian's sale of real estate without notice is void for want of jurisdiction. The Probate Court apparently recognized this and did provide for service upon Della Vanderlinden. Her presence and whereabouts were known. However, the fact that she shared her mailing address with W. F. Vanderlinden, an adversary party, should have ruled out ordinary mail service as meeting due process grounds of actually informing her of the hearing.

In making its Motion For Summary Judgment and in prior appellate proceedings, the appellant urged that there was nothing to show that Della Vanderlinden could not have been served by a method other than ordinary mail would have provided the court with an appropriate return to show the trial court that Della Vanderlinden did receive the notice to which she was entitled.

The trial court relied on the facts provided by discovery included in appellant's Motion For Summary Judgment and in testimony at the hearing that due process requirements had not been met.

The Court of Appeals seemingly only concentrated on the time period of ten days as sufficient for an in-state party to prepare for hearing and did not consider the adversary relationship of the parties and the physical infirmities of Della Vanderlinden or the availability of alternative and superior methods of service in making its conclusion.

Appellant would submit that none of the facts in this case would have justified an exception to the rule of personal service of notice set forth in *Mullane.* Moreover, even if mailing of notice were proper by use of ordinary mail, the peculiar circumstances of legal adversaries sharing a common mailing address would make ordinary methods unacceptable when those circumstances are known to the person attempting to make service. In short, due process may require more than ordinary measures which are mere gestures in extraordinary circumstances. In making such argument, reliance on *Robinson v. Hanrahan,* 409 U. S. 38, 93 S. Ct. 30, 34 L. Ed. 47 (1972) and *Covey v. Town of Somers,* 351 U. S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956) was made to the trial court and the Iowa Court of Appeals and the Iowa Supreme Court. Such construction is clearly an attack on one of the basic components of procedural due process as guaranteed by the Fourteenth Amendment. The court has held that it is not bound by a state court's construction of a statute when the question is whether the statute provided for the notice required to constitue due process of law. *Scott v. McNeal,* 154 U. S. 34, 45-46, 14 S. Ct. 1108, 1112, 38 L. Ed. 896, 901 (1894).

IV.

The Court of Appeals violated due process standards by improperly transferring the jurisdictional burden of proving notice to the appellant and improperly applied the presumption of receipt of mailed notice to this case.

This court has discussed the concept of improper allocation of burdens of proof and presumptions as violating the Fourteenth Amendment due process clause when framed in the context of proof of residence for college tuition in *Vlandis v. Kline,* 412 U. S. 441, 37 L. Ed. 2d 63, 93 S. Ct. 2230, and in removal of tax exemptions in *Speiser v. Randall,* 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

In the present case, the Court of Appeals found that the burden of showing proof of service should rest on the appellant, rather than the appellee, the party relying on the validity of such service. Generally, the rule of proving that notice is in fact received is left to the party asserting the existence of proper notice. 66 C. J. S., Notice, Sec. 21 (a) at 634. This appears to be a specific example of what is recognized as a general rule under Iowa Rule of Appellate Procedure, Rule 14 (f) (5) that burden of proof on an issue is ordinarily upon the party who suffers a loss if the issues were not established.

The Court of Appeals urged the presentation of receipt of mailed notice and the filing of an affidavit of mailing as sufficient to show that notice was received. Appellant challenged the authenticity of the affidavit of mailing which was not ruled on by the trial court. Beyond that, however, the facts which were before the trial court

in ruling on plaintiff's motion and before the Court of Appeals presented a set of circumstances making it unlikely that Della Vanderlinden personally picked up her mail and making it likely that any mail addressed to her was picked up by W. F. Vanderlinden, a legally adverse party and the party obligated to make such notice. The only inference that could be made under these facts from the presumption of mailing is that W. F. Vanderlinden did receive notices mailed to his wife.

Thus due process was again violated both by improper allocation of burden of proof and improper utilization of a presumption whose validity was negated by facts already on the record.

———o———

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Counsel for Appellant

July 28, 1980.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF IOWA

No. 2-63211

DEAN VANDERLINDEN, Executor of the Estate of W. F. Vanderlinden, Deceased,

Plaintiff-Appellee,

vs.

RICHARD VANDERLINDEN and RICHARD VANDERLINDEN, Executor of the Estate of Agatha Vanderlinden, Deceased,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed May 29, 1980)

Notice is hereby given that Dean Vanderlinden, Executor of the Estate of W. F. Vanderlinden, Deceased, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Iowa overruling and denying a petition for further review from an opinion of the Iowa Court of Appeals entered in this case on May 2, 1980.

This appeal is taken pursuant to 28 U. S. C. § 1257 (2).

Gallagher, Langlas & Gallagher, P.C.

By /s/ Edward J. Gallagher, Jr.

By /s/ E. J. Gallagher, III

405 East Fifth Street, P. O. Box 2615
Waterloo, Iowa 50704

Martin, Keith & Pedersen
By /s/ Michael M. Pedersen
Suite 200, First Federal Building
Waterloo, Iowa 50703

Attorneys for Dean Vanderlinden, Executor of the Estate of W. F. Vanderlinden, Deceased, Appellant

I, Edward J. Gallagher, Jr., one of the attorneys for Dean Vanderlinden, Executor of the Estate of W. F. Vanderlinden, Deceased, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 28th day of May, 1980, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties hereto, as follows:

1. On Richard Vanderlinden and Richard Vanderlinden, Executor of the Estate of Agatha Vanderlinden, Deceased, intervening defendants, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record as follows:

To P. F. Elgin, Esq., Attorney for Richard Vanderlinden and Richard Vanderlinden, Executor of the Estate of Agatha Vanderlinden, Deceased, 106 East Salem Avenue, Indianola, Iowa 50125.

/s/ Edward J. Gallagher, Jr.

Attorney for Dean Vanderlinden, Executor of the Estate of W. F. Vanderlinden, Deceased, Appellant

405 East Fifth Street
P. O. Box 2615
Waterloo, Iowa 50704

IN THE SUPREME COURT OF IOWA

No. 2-63211

DEAN VANDERLINDEN, Executor of the Estate of W. F. VANDERLINDEN, Deceased,

Plaintiff-Appellee-Applicant,

vs.

RICHARD VANDERLINDEN and RICHARD VANDERLINDEN, Executor of the Estate of DELLA VANDERLINDEN, Deceased,

Defendants-Appellants-Resisters.

ORDER

(Filed May 2, 1980)

After consideration by the court en banc plaintiff-appellee's application for further review is hereby overruled and denied.

Done this 2nd day of May, 1980.

THE SUPREME COURT OF IOWA

By /s/ W. W. Reynoldson,
Chief Justice

Copies to:

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IN THE COURT OF APPEALS OF IOWA

310

2-63211

DEAN VANDERLINDEN, Executor of the Estate of W. F. VANDERLINDEN, Deceased,

Plaintiff-Appellee,

vs.

RICHARD VANDERLINDEN and RICHARD VANDERLINDEN, Executor of the Estate of AGATHA VANDERLINDEN, Deceased,

Defendant-Appellant.

(Filed February 20, 1980)

(Filed February 26, 1980)

Opinion signed on February 20, 1980 and was filed with the Clerk of the Supreme Court of Iowa on February 26, 1980.

Appeal from Warren District Court—
M. C. Herrick, Judge.

Defendant appeals from trial court's granting of summary judgment for plaintiff and denying summary judgment for defendant in plaintiff's declaratory judgment action to void a land contract entered into pursuant to a court-authorized conservator's sale of property.—Reversed.

P. F. Elgin & Claire B. Patin, of Elgin, Hoyman & Clogg, Indianola, for defendant-appellant.

E. J. Gallagher, III, & Michael M. Pedersen, of Gallagher, Martin, Keith & Langlas, Waterloo, for plaintiff-appellee.

Heard by Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from the trial court's granting of summary judgment for plaintiff in a declaratory judgment action brought by plaintiff to set aside a land contract entered into pursuant to a court-authorized conservator's sale of property. The trial court held that the five-day mailed notice prescribed by the probate court for the hearing on the conservator's application to sell the property was an abuse of discretion and a denial of procedural due process. The trial court also held that a prior Iowa Supreme Court opinion in this case determined that plaintiff's allegations of fraud and undue influence did not constitute a collateral attack on the order authorizing the conservator's sale, and consequently denied defendant's motion for summary judgment. We reverse.

Plaintiff's petition for declaratory judgment was brought in equity pursuant to section 633.33, The Code 1973. Thus, our review is de novo. *In re Estate of Lemke,* 216 N. W. 2d 186, 189 (Iowa 1974); Iowa R. App. P. 4. We give weight to the trial court's findings of fact, but we are not bound by them. *Lemke,* 216 N. W. 2d at 189; Iowa R. App. P. 14 (f) (7).

In ruling on a motion for summary judgment, the trial court is required to look at the whole record, including pleadings, answers to interrogatories, admissions on file, and affidavits, in the light most favorable to the party against whom the motion was made. *Tasco, Inc. v. Winkel,* 281 N. W. 2d 280, 282 (Iowa 1979). The burden is on the moving party to show the absence of a fact issue, and even if the facts are undisputed, if reasonable minds could draw different inferences from them, the motion should be

denied. *Id.* We apply these same principles in reviewing the trial court's ruling on the motion. *Id.*

I. We conclude that the trial court erred in ruling that the probate court's ordering of mailed notice to the ward at least five days before the hearing on the conservator's application to sell the property was an abuse of discretion and a denial of procedural due process. The notice was prescribed by the trial court pursuant to sections 633.40 and 633.389, The Code 1971, which gave the probate court complete discretion over the time and manner of the service of notice. The trial court interpreted the case of *Flanders v. Waterloo Community School District,* 217 N. W. 2d 579 (Iowa 1974) as requiring proof of receipt of notice when notice was mailed. However, *Flanders* stated that proof of receipt of notice is crucial whenever the statute "requires a person to notify in writing or to give written notice." *Id.* at 582. Section 633.40, The Code 1971 did not require the notice to be given [in writing], since it gave the court full discretion to determine the manner of service of the notice. That the notice here was, in fact, given in writing does not automatically require invocation of the general rule stated in *Flanders,* since written notice was not the manner necessarily prescribed by the statute. Furthermore, the preceding distinction notwithstanding, there is a long-established presumption in Iowa of receipt of mailed notice if it was properly addressed and otherwise conforming to postal laws and regulations regarding postage. *Eves v. Iowa Employment Security Commission,* 211 N. W. 2d 324, 327 (Iowa 1973). There is an affidavit in the record of this case stating that the mailed notice was properly addressed and mailed according to the postal laws and regulations. Thus, the notice was presumed to

have been received. Plaintiff could have rebutted the presumption by merely asserting that the notice was not received. *Roshek Realty Co. v. Roshek Brothers Co.*, 249 Iowa 349, 356, 87 N. W. 2d 8, 13 (1957). However, our review of the record reveals no such assertion. Indeed, the application of the *Flanders* rule to the case at bar is weakened since in *Flanders,* the court emphasized that the notice was not in fact received, 217 N. W. 2d at 583, whereas in the case at bar, plaintiff has not contended that notice was not received, thus leaving the presumption of receipt of the notice unrebutted. The above-mentioned affidavit further shows that the notice was mailed ten days prior to the hearing date to both the ward, Della Vanderlinden, and her guardian ad litem, who is an attorney. An answer was timely filed by the guardian ad litem.

The trial court also characterized the five-day time period as being too short to adequately notify plaintiff of the conservator's application to sell and still allow sufficient time to appear and object to the application, and was thus an abuse of discretion and a denial of procedural due process. We disagree. The trial court relied on *In re Estate of Lemke,* 216 N. W. 2d 186 (Iowa 1974), which held that a ten day notice was insufficient to meet procedural due process requirements when the notice was mailed from Iowa to the recipient who was a resident of Texas. *Id.* at 188-90. We think the differences between *Lemke* and the case at bar are sufficient to limit Lemke applicability to this case. Here, the notice was mailed a distance of less than twenty miles as opposed to the distance between Iowa and Texas. The recipient of the notice here did not have to go through the process of obtaining Iowa counsel to make an appearance as did the Texas recipient in *Lemke.*

In fact, the recipient here had counsel in the form of a guardian ad litem appointed for the very purpose of representing her in the proceedings. Consequently, we conclude that *Lemke* is too easily factually distinguishable from the case at bar to warrant direct application of it factual holding.

The general due process principles with regard to notice that were espoused in *Lemke* and drawn from the Supreme Court case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) are directly applicable to this case and we apply them accordingly. To comply with due process,

> [t]he notice must be of such nature as reasonably calculated to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Id. at 314-15, 70 S. Ct. at 675, 94 L. Ed. at 873. We think that under the circumstances of this case, including the distance involved and the availability of counsel for the recipient, five days was a reasonably calculated amount of time within which the recipient of the notice could have received the required information and made the necessary arrangements to make an appearance. Consequently, the probate court did not abuse its discretion or deny due process in prescribing mailed notice at least five days before the hearing on the conservator's application to sell the property. The trial court erred in granting plaintiff's motion for summary judgment on that ground and we reverse that ruling.

II. We now turn to defendant's claim that the trial court erred in denying its motion for summary judgment. Defendant contends that plaintiff's allegations of fraud and undue influence constituted a collateral attack on the order authorizing the conservator's sale of the property. The trial court held that a prior supreme court opinion reversing the granting of defendant's motion to dismiss in ealier proceedings in this case effectively determined that plaintiff's allegations did not constitute a collateral attack on the prior order. We conclude that the trial judge erred in so holding. The basis for reversal of defendant's motion to dismiss in *Vanderlinden v. Vanderlinden,* No. 2-57357 (Iowa, filed Jan. 19, 1977) was the failure to introduce the order of the conservatorship proceedings. Thus, the reversal was based on defendant's failure to introduce an essential element of its contention that plaintiff's action was a collateral attack, not on the sufficiency of the case pleaded by plaintiff.

The order of the probate court authorizing the sale of the property has the force and effect of a judgment and as such is accorded the same protection against collateral attack as judgments in law and equity. *Stake v. Cole,* 257 Iowa 594, 602, 133 N. W. 2d 714, 718 (1965). We find plaintiff's allegations of fraud and undue influence in his petition for declaratory judgment raised matters intrinsic in the matters before the court at the hearing on the conservator's application to sell, and as such constituted an impermissible collateral attack on the probate court's order authorizing the sale. *See Gagen v. Bankers Trust Co.,* 251 Iowa 953, 956, 103 N. W. 2d 743, 745 (1960); *Anderson v. Schwitzer,* 236 Iowa 765, 772, 20 N. W. 2d 67, 71 (1945).

Consequently, we reverse the trial court's denial of defendant's motion for summary judgment and order summary judgment to be granted in favor of defendant.

REVERSED.

IN THE DISTRICT COURT OF THE STATE OF IOWA

IN AND FOR WARREN COUNTY

Case No. 17610

DEAN VANDERLINDEN, Executor of the Estate of W. F. VANDERLINDEN, Deceased,

Plaintiff,

vs.

RICHARD VANDERLINDEN and RICHARD VANDERLINDEN, Executor of the Estate of AGATHA VANDERLINDEN, Deceased,

Defendants.

RULING & JUDGMENT

M. C. Herrick, Judge

This matter comes again before the Court, following plaintiff's appeal from the order of April 3, 1974, sustaining defendants' motion to dismiss. The motion was based on the allegation that the petition was a collateral attack on the proceedings in the Della Vanderlinden Conservatorship, and that plaintiff as executor of Della Vanderlinden Estate had listed the contract of sale of land to defendants as an asset, and was estopped from asserting the invalidity of the contract. In the opinion filed January 19,

1977, the Iowa Supreme Court reversed the order of dismissal. In so doing, the Court held that plaintiff, as an heir of W. F. Vanderlinden (husband and conservator of Della, and now deceased) could maintain the action alleging fraud on the Probate Court, and the conservator, as well as undue influence, and incompetence of both the conservator and his ward. The Court further held that issues of fact were involved and sufficiently pleaded which could not be raised by a motion to dismiss, and remanded the cause for further proceedings.

The answer filed August 31, 1978, admits plaintiff is a son and heir of W. F. Vanderlinden, deceased; the execution of the contract; that the land belonged to Della Vanderlinden; that the contract was entered into by W. S. Vanderlinden, as conservator of the property of Della Vanderlinden; that the conservatorship was opened upon a voluntary petition, dated April 10, 1972, and filed April 12, 1972. The answer denies the incompetence of said ward and her conservator, as well as the allegations of fraud and undue influence.

For affirmative defense, the defendants allege that the petition is a collateral attack; that the plaintiff lacks standing; that he is estopped by reason of filing a preliminary inheritance tax report as executor of the Della Vanderlinden Estate listing the contract of sale to defendants as an asset of the estate and by the doctrine of "res judicata."

Plaintiff thereafter filed a demand for a jury trial, requests for admissions, and the sworn depositions have been taken of defendants and the attorney and scrivenor of the wills of both W. F. and Della Vanderlinden, Mason G. Ouderkirk.

The matters now before the Court are the motion for Summary Judgment, filed December 6, 1978, by plaintiff, the resistance thereto, filed by defendants December 11, 1978, the plaintiff's motion for adjudication of law points, filed December 6, 1978, and resistance thereto, filed December 11, 1978, and defendants' motion for summary judgment, filed by defendants on December 12, 1978. The motions were all set for hearing on January 12, 1979, at which time counsel for both parties appeared, testimony of Phil Watson, guardian-ad-litem, in the proceedings to sell real estate was taken, and oral arguments were made by counsel on both sides. In addition, the Court has written briefs regarding the law pertaining to said motions from each counsel.

FINDINGS OF FACT

From the admitted pleadings, admissions, answers to written interrogatories and to oral depositions, the Court finds:

That W. F. Vanderlinden was appointed conservator of the property of his wife, Della Vanderlinden, on her voluntary petition filed April 12, 1972. That on April 27, 1972, an application for sale of certain farm land in Warren County owned by the ward was filed and an order entered for a hearing thereon to be held May 8, 1972, at 1:30 p.m. The order further provided "That notice of said hearing be given by mailing a copy of this order together with a copy of the application herein referred to, to Della Vanderlinden at Box 6, Milo, Iowa, and a copy of said application and order to Phil Watson, at least 5 days before said hearing, all by ordinary mail."

An affidavit dated April 28, 1972, of one Lois Darr was filed June 14, 1972, showing mailing of "application for sale of real estate and order for hearing" by ordinary mail on April 28, 1972, to Della Vanderlinden, Box 6, Milo, Iowa, 50166, and Phil Watson, attorney at law, 4044 S. E. 14th Street, Des Moines, Iowa, 50300. The answer of guardian-ad-litem was filed May 8, 1972, denying the application and stating that the return of service had been examined showing a mailing of notice as required by the order. Mr. Watson testified January 12, 1979, that he did examine the return of service, that he did not attempt to learn if Della Vanderlinden had received the notice of hearing, and had no knowledge that she did, in fact, receive same; that he never talked to Della Vanderlinden and the answer he signed was prepared by Mason G. Ouderkirk, attorney for conservator. That defendant's sworn deposition shows that Della did not leave the home after surgery in March, except on occasion when she rode in the car driven by the conservator, W. F. Vanderlinden, and he would have received any mail placed in Box 6, Milo, Iowa.

June 6, 1972, an order was entered authorizing the conservator to sell said land at a price in excess of the appraised value, and on June 14, 1972, an order was entered on a report of sale of said land for $100,000 approving the sale and directing the conservator, W. F. Vanderlinden to enter into the agreement and deliver possession of the premises on receipt of the down payment.

That a real estate contract was signed and acknowledged June 8, 1972, by W. F. Vanderlinden, individually and as conservator of Della Vanderlinden, as vendor, and Richard Vanderlinden and Agatha Vanderlinden, as pur-

chasers for $100,000 of which $29,750 was to be paid down and balance $1,500 on March 1, 1973, and $1,500 on the first day of March of each year thereafter until fully paid; deferred payments to draw 6% interest payable annually after March 1, 1972. Possession was to be delivered July 8, 1972.

The copy of the preliminary inheritance tax report in the Della Vanderlinden Estate, Exhibit "A" attached to defendants' motion to dismiss, recites that Della died testate on June 25, 1972, and lists W. F. Vanderlinden, deceased October 30, 1972, M. G. Ouderkirk, Executor, and also eight children and one grandchild as heirs of said decedent.

The Last Will and Testament of Della Vanderlinden, dated February 6, 1966, left all her property to her husband, W. F. Vanderlinden, if he survived her. If he failed to survive, she willed her property to her children in equal shares.

The inventory listed a (sic) total net assets of $129,-432.83 of which the unpaid down payment and deferred balance on the real estate contract due amounts to $100,000.

That according to the sworn testimony of the attorney for the conservator, M. G. Ouderkirk, W. F. Vanderlinden was familiar with the terms of the ward's will, and made a similar will at the same time and place and that the wills were left in the attorney's office.

CONCLUSIONS OF LAW

Defendants' motion for summary judgment, and plaintiff's motion for adjudication of law points raise substantially the same questions: (1) Whether plaintiff has stand-

ing to contest the validity of the contract and (2) that there has been an adjudication in the conservatorship concerning the validity of the contract which cannot be collaterally attacked in these proceedings.

It is the opinion of the Court that these issues were necessarily decided by the Iowa Supreme Court on the appeal. They were the basis of defendants' motion to dismiss, in addition to the alleged estoppel as a result of the plaintiff executing, as Executor of the Estate of Della Vanderlinden, the probate inventory including the contract. The decision on appeal is a holding that plaintiff, as an heir, has standing and is entitled to attempt to prove fraud and undue influence on the parents at the time of the execution of the contract. Plaintiff has a pecuniary interest in the outcome of the case and standing.

Turning to plaintiff's motion for summary judgment, the allegations of fraud, undue influence must be decided by the trier of facts. These questions are not allowed to be resolved by the Court on a motion for summary judgment. The Court is limited here to a consideration of admitted, undisputed facts, as shown by sworn affidavits, not disputed, and questions of law.

For the above reasons the defendants' motion for summary judgment is overruled.

With reference to plaintiff's allegations that the conservator failed to comply with Sec. 633.643, Code of 1971, by delivering the ward's will to the Court, the deposition of the attorney, M. G. Ouderkirk, shows the wills of both Mr. and Mrs. Vanderlinden were executed at the same time in his office and left with him for safekeeping. Apparently, by oversight, the will of Della was not delivered to the

Court. However, the Court cannot find this constituted fraud as a matter of law. At the most, it would be only evidence which might be admitted on the issue of fraud. The statute does not expressly state the consequences of a failure to file the will. Therefore, the Court cannot sustain plaintiff's motion for summary judgment on this ground.

The remaining ground of plaintiff's motion for summary judgment is that the notice given by the conservator of the hearing on conservator's application to sell the real estate was insufficient to give the Court jurisdiction, and that the order approving the contract was void.

Section 633.40 of the 1971 Code, in effect at the time of the proceedings, provided:

> "Except as otherwise provided in this Code, the court shall fix the time and place of hearing on any matter requiring notice and shall prescribe the time and manner of service of the notice of such hearing."

The statute was later amended by the 1972 G. A. Chap. 1128 to add par. 5 providing specifically for notice by mail.

The decision of the Iowa Supreme Court in Flanders v. Waterloo Comm. School District, 217 N. W. 2d 579, is based on an interpretation of the statute governing termination of a teacher's contract is not squarely in point, but the general rule may have some application, and is stated on page 582 as follows:

> "The general rule is that when a statute or other provision does not expressly authorize notice by publication, mail, or some other specified method, but requires a person to notify in writing or give written notice, then the method of transmitting the writing to the recipient is not important but receipt of the writing by the one to be notified is essential."

In the case of Estate of Lemke, 217 N. W. 2d 186 the Court had to pass upon the sufficiency of notice of hearing on the executor's application to sell real estate. (The same procedure is made to apply to similar proceedings by conservators under Sec. 633.52, Code of 1971.) The application was filed November 20, 1970, and on the same date the court entered an order fixing December 7, 1970, as the date for hearing, and directed that notice thereof be mailed to Wayne by certified mail at his last known designated address in Houston, Texas. Wayne had moved to Bellaire, Texas, and received the notice November 28, 1970—nine days before the date of hearing. In holding the notice insufficient, the Supreme Court said:

> "Reduced to bare essentials the question resultantly posed is whether the attempted notifications by mail sufficed, under the circumstances, to meet procedural due process requirements.
>
> These court ordered notices were unquestionably authorized by Code Secs. 633.40 (1) and 633.489. But those statutory enactments understandably specify no length of time for giving of notice. That does not mean, however, the notifications specified by court order in the matter at hand were ipso facto proper or adequate. Actually, all such action related notifications must meet constitutional muster, i. e., procedural due process.
>
> And as here involved that precept mandates notice and opportunity for hearing appropriate to the nature of the case. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 313-314, 70 S. Ct. 652, 656-657, 94 L. Ed. 865 (1950)."
>
> "Unquestionably any such notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action *and afford them an opportunity to present their*

objections.' (Emphasis supplied.) Mullane v. Central Hanover Bank & Trust Co., supra.

"Significantly, fulfillment of these due process requirements depends upon the facts and circumstances in each case. As stated in Mullane:

> " 'If with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' 339 U. S. at 314-315, 70 S. Ct. at 657."

In the instant case, the order provided for notice by ordinary mail five days prior to the hearing on the application to sell real estate, to be mailed to the ward at Box 6, Milo, Iowa. The ward and conservator were husband and wife, living together and receiving mail at the same box. Della Vanderlinden was not driving a car, she did not leave home often after her surgery in March, because she was self-conscious about the colostomy bag, and if she went with her husband she would not have gotten out of the car for any errands, such as, picking up mail. These facts appear through the sworn deposition of defendant, and are not disputed. Further, there is no evidence that the ward actually received the mailed notice. Even if received, the ward could hardly be expected to prepare a defense within 5 days, in view of all the circumstances.

It is the opinion of the Court that the attempted notice in this case was insufficient to meet due process requirements, and that the probate court was without jurisdiction to approve or authorize the contract of sale, Exhibit "A", and that said contract is void and without legal effect.

The terms of the contract, on its face, are contrary to the ward's best interest, as well as her testimentary intent. It would tie up the majority of her assets for a period of over 40 years at a time when she might need all that she owned for medical and nursing home care.

It is further ordered that the land be listed as real estate in the Della and W. F. Vanderlinden Estates, and that the personal representatives seek an accounting from defendants as may be just and equitable. Judgment for costs against defendants.

Dated at Indianola, Iowa, this 6th day of February, 1979.

.....

M. C. HERRICK, Judge

Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

80-138

No. .....

In The

Supreme Court of the United States

October Term, 1980

—o—

DEAN VANDERLINDEN, EXECUTOR OF THE ESTATE OF W. F. VANDERLINDEN, DECEASED,

Appellant,

vs.

RICHARD VANDERLINDEN AND RICHARD VANDERLINDEN, EXECUTOR OF THE ESTATE OF AGATHA VANDERLINDEN, DECEASED,

Appellee.

—o—

ON APPEAL FROM THE SUPREME COURT OF IOWA

—o—

MOTION TO DISMISS APPELLANT'S APPEAL

—o—

MOTION TO AFFIRM DECISION OF IOWA COURT OF APPEALS

—o—

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No. .....

—o—

In The

Supreme Court of the United States

October Term, 1980

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DEAN VANDERLINDEN, EXECUTOR OF THE ESTATE OF W. F. VANDERLINDEN, DECEASED,

Appellant,

vs.

RICHARD VANDERLINDEN AND RICHARD VANDERLINDEN, EXECUTOR OF THE ESTATE OF AGATHA VANDERLINDEN, DECEASED,

Appellee.

—o—

ON APPEAL FROM THE SUPREME COURT OF IOWA

—o—

MOTION TO DISMISS APPELLANT'S APPEAL

—o—

MOTION TO AFFIRM DECISION OF IOWA COURT OF APPEALS

—o—

MOTION TO DISMISS APPELLANT'S APPEAL AND MOTION TO AFFIRM DECISION OF IOWA COURT OF APPEALS

COMES NOW Appellee, Richard Vanderlinden and Richard Vanderlinden, Executor of the Estate of Agatha Vanderlinden, Deceased, and moves the Court to dismiss Appellant's Direct Appeal to the United States Supreme

Court or, in the alternative, to affirm the decision of the Iowa Court of Appeals, dated February 26, 1980, for the following reasons and grounds:

I. Appellant has not challenged the validity of an Iowa statute to warrant a direct appeal and the validity of an Iowa statute was not expressly passed on by the Iowa Court of Appeals.

II. Appellant has failed to raise a substantial federal question in that Appellant did not properly raise the issue of whether the ward was given notice in conformity with due process so as to present a justiciable case or controversy.

III. The notice procedure prescribed by the Court in the Della Vanderlinden Conservatorship proceeding did not violate due process of law.

IV. The decision of the Iowa Court of Appeals was decided on the basis of collateral attack, a non-federal basis.

———o———

ARGUMENT

I.

Appellant has not challenged the validity of a state statute to warrant a direct appeal from a state court decision.

28 U. S. C. Section 1257 (2) provides for a direct appeal, inter alia, where the validity of a state statute is drawn in question as being repugnant to the Constitution,

treaties, the laws of the United States, and the decision was in favor of its validity.

Appellant has not challenged the validity of any state statute. Appellant has only raised the issue of whether the notice given to the ward violated due process of law. Hence, there was no challenge to a particular statute.

In *Kulko v. Super. Ct. of California,* 436 U. S. 84, 90 (1978), the U. S. Supreme Court held that the case before them was improperly brought as an appeal since no state statute was drawn in question as being repugnant to the Constitution.

> Appellant did not argue below that this statute was unconstitutional but instead argues that the due process clause of the XIV Amendment precluded the exercise of in personam jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather the question decided was whether the Constitution itself would permit the assertion of jurisdiction. *Hanson v. Denkla,* 357 U. S. 235, 248 (1958).

The same reasoning is applicable to the case at bar. Appellant did not contend that *Iowa Code* Section 633.40 or 633.389 (1971) was unconstitutional on its face or as applied to the facts. In fact, the notice issue was not raised in Appellant's original Petition for Declaratory Judgment nor in his amended Petition. The first reference to the notice issue was contained in Appellant's Motion for Summary Judgment. However, the reference was not to the constitutional validity of the notice statute, but only to the propriety of the manner and time of the notice.

Nor did the Iowa Court of Appeals pass on the validity of these statutes. The Iowa Court, as in *Hanson v. Denkla,*

supra, and *Kulko v. Super. Ct. of California,* supra, addressed and resolved only the issue of whether the notice prescribed was in accordance with due process.

Appellant's purported attack on the construction of *Iowa Code* Section 633.40 and Section 633.389 (1971) is based on an erroneous construction of the Iowa Court of Appeals' opinion. Appellant contends that the Court of Appeals construed the meaning of the word "notice" to permit an oral communication. Appellant's Jurisdictional Statement at 16. Such a construction is without support or foundation. Written notice was given in the case at bar and is the judicially accepted practice in this state. The question of whether an oral notice would have been proper is irrelevant since it is undisputed that the notice was, in fact, in writing.

Appellant's reference to selected sentences in one paragraph of the Court of Appeals' opinion was taken out of context. Appellant's Jurisdictional Statement at 16. A reading of the entire paragraph shows that the Court of Appeals was not altering the basic concept that notice must be a written communication. Opinion, Court of Appeals, App. p. 6. But rather the Court was saying that under *Iowa Code* Section 633.40 (1971), the written communication need not be the formalized writing required in *Flanders v. Waterloo Community School District,* 217 N. W. 2d 579 (Iowa 1974), for notice in an Administrative proceeding.

Furthermore, *Flanders,* supra, did not involve an interpretation of a judicial Order. In fact, the Court in *Flanders,* 217 N. W. 2d at 581, specifically prefaced its opinion by saying:

> At the outset we note that the steps to be taken by the board are at statutorily mandated dates and times. Those dates and times must, therefore, be observed; we cannot judicially supercede them by times which we might deem "reasonable." 217 N. W. 2d at 581.

Thus the Court in *Flanders,* supra, virtually limited the applicability of its opinion to cases interpreting the administrative statute involved.

The Court of Appeals, in the case at bar, was not referring to the deletion of a written notice; but rather the Court was referring to the deletion of the formalized rules set forth in *Flanders,* supra. This interpretation of the Court of Appeals' opinion is entirely consistent with prior judicial opinions and with the established practice for notice in the courts of Iowa.

The construction of the statute has not been challenged. Appellant's only basis for attack on the statute is a distorted construction of the Iowa Court of Appeals' opinion in order to make it appear that the statute was called into question.

Consequently, the U. S. Supreme Court lacks appellate jurisdiction. Appellee urges the Court to dismiss the appeal under 28 U. S. C. Section 1257 (c) (2).

II.

Appellant did not properly raise the issue of whether the ward was given notice in conformity with due process so as to present a justiciable case or controversy.

The Courts of the United States are Courts of limited jurisdiction. One of the limitations placed on the Courts

by the Constitution restricts the judicial process to "cases or controversies." U. S. Const. Art. III, Section 2.

Appellant did not allege, nor did he present any evidence, that the ward did not actually receive the notice. Hence, it must be assumed that the ward did, in fact, receive the notice. The case must be decided upon the pleadings as they are, and not upon averments which might have been, but were not, included therein. *Lewis v. Farmers' Grain Co. of Cambridge,* 214 Iowa 143, 241 N. W. 469, 471 (1932).

In essence, Appellant is asking the Court whether there would have been a violation of due process if the ward had not received the notice. Such a request does not present a justiciable case or controversy.

"A justiciable controversy is thus distinguishable from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . It must be a real and substantial controversy admitting of specific relief for a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth,* 30 U. S. 227, 239-240 (1937).

> The (Appellant) has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether the effect of applying the statute is to deprive him of his property without due process of law. Castillo v. McConnico, 168 U. S. 674, 680 (1897).

The Courts would be unduly burdened with unnecessary litigation if a party could come into Court with a

hypothetical issue. Such a practice would defeat the very basis of the "case or controversy" concept.

Appellant has not presented a proper set of facts to raise a constitutional violation. Without an allegation or some evidence that the ward did not receive the notice, the Court is without jurisdiction absent a case or controversy.

III.

The notice procedure prescribed by the Court in the Della Vanderlinden conservatorship proceeding did not violate due process of law.

Appellant contends that the notice procedure presented by the Court in the Della Vanderlinden Conservatorship proceeding violated due process in three respects. The first alleged violation is the propriety of the Court's prescription of notice by ordinary mail. The second alleged violation is the constitutional validity of the Affidavit of Mailing as proof of receipt of the Notice. The third alleged violation is the presumption created by the Affidavit of Mailing.

Addressing the first contention, Appellee submits that the notice given to the ward pursuant to the Court Order prescribing notice by ordinary mail did not violate due process. The notice complied with the Iowa Probate Statute in effect in 1971 relating to notice:

Notice in Probate Proceedings

(1) Court prescribing notice. Except as otherwise provided in this Code, the Court shall fix the time and place of hearing on any matter requiring notice and shall prescribe the time and manner of service of the

notice of such hearing. *Iowa Code* Section 633.40 (1971).

The Court in the Conservatorship proceeding specifically found that notice was given as prescribed by Court Order. Appellant argues that the procedure of mailing notice was not sanctioned until 1972 when it was statutorily approved. However, prior to this time, the practice of mailing notice was both common and accepted. *In Re Estate of Staab,* 192 N. W. 2d 804 (Iowa 1971). Hence the 1972 amendment to the notice section of the Iowa Probate Code merely codified the judicially accepted practice of prescribing notice by ordinary mail.

Appellant contends that the notice by ordinary mail did not meet the test of due process presented in *Mullane v. Central Hanover Bank & Trust Company,* 339 U. S. 306 (1950). However, *Mullane,* supra, required, not the best possible notice, but that the notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U. S. 306, 314 (1950).

The "circumstances" in the case at bar include the fact that the ward had, on several occasions, discussed the sale with her husband, the Conservator, and her son, the purchaser. She opened a voluntary conservatorship nominating her husband as Conservator. Although the sale proceeding was technically adversary in nature, the underlying facts reveal that the ward had full knowledge of the sale and was in agreement with the sale.

In order to insure greater protection for the ward, the Court appointed a Guardian ad Litem to represent her

best interests. The Guardian ad Litem was also served with notice of the sale proceedings.

Furthermore, in her Will, the ward left her property to her husband and named him Executor of her Estate. Appellant apparently interpreted the ward's lack of objection to the sale as evidence that she failed to receive the notice. The contrary is clearly the case. The ward was in full agreement with the sale and saw no need to take action upon receipt of the notice. Under all these circumstances, the Court of Appeals correctly held that the notice prescribed by the Court was reasonably calculated to apprise her of the sale and to give her an opportunity to be heard.

Appellant's second and third contentions actually involve a single issue. Appellant contends that the Affidavit of Mailing failed to comply with due process; he further contends that the presumption created by the Affidavit of Mailing violated due process.

The requisite Affidavit of Mailing was filed in the Conservatorship proceeding showing that the notice was sent to the ward by ordinary mail. The Affidavit created a presumption that the notice was received. *Roshek Realty Company v. Roshek Brothers Company,* 249 Iowa 349, 356, 87 N. W. 2d 8, 13 (1957); *Eves v. Iowa Employment Security Commission,* 211 N. W. 2d 324, 327 (Iowa 1973). This presumption could have been rebutted by evidence to the contrary, i. e., that the notice was not received. Appellant did not allege, nor did he present any evidence, that the ward did not receive the notice.

Furthermore, the presumption of actual receipt of notice is not a violation of due process. The presumption

is rebuttable and, therefore, distinguishable from the conclusive presumption held invalid in *Vlandis v. Kline,* 412 U. S. 441 (1973), cited by Appellant. A rebuttable presumption merely imposes the burden on the party contesting the notice to present some evidence of non-receipt of the notice. Appellant failed to rebut the presumption in that he failed to allege or present evidence of non-receipt.

Appellant's reliance on *Flanders v. Waterloo Community School District,* 217 N. W. 2d 579 (1974), is misfounded. In *Flanders,* supra, the Court required proof of receipt of the notice because it was undisputed that notice was not actually received in accordance with the statute, i. e., the presumption was rebutted. Conversely, in the case at bar, Appellant did not rebut the presumption of actual receipt of the notice. Furthermore, the notice in *Flanders,* supra, was not held to be in violation of due process. The Court specifically stated that it was not deciding whether the notice procedure was "reasonable," but only whether it complied with the specific statutory requirement for notice in a school contract action. 217 N. W. 2d at 581.

Nor is Appellant justified in relying on *Covey v. Town of Sommers,* 351 U. S. 141 (1956). In *Covey,* supra, the Court found that notice to the ward by ordinary mail was a violation of due process because the ward was incompetent and did not have a Guardian appointed to represent her interests. The case is clearly distinguishable from the case at bar. It is undisputed that Della Vanderlinden was mentally competent at all stages of the proceeding. Furthermore, a Guardian ad Litem was appointed to protect her interests and was served with notice of the sale proceeding.

The notice prescribed was in accordance with the Iowa Probate Code, Iowa case law, and with the due process clause. Under all of the circumstances, the procedure used in prescribing notice met the *Mullane* standards of being "reasonably calculated", under all the circumstances, to apprise the ward of the pending sale.

IV.

The decision of the Iowa Court of Appeals was decided on the basis of collateral attack, a non-federal issue.

Appellant's Petition for Declaratory Judgment in the Estate Proceeding of Della Vanderlinden was a collateral attack on the judgment of the Court in the prior Conservatorship proceeding of Della Vanderlinden. The Order of the Court in the Conservatorship proceeding authorizing the sale of the ward's property had the force and effect of a judgment or final adjudication. *Stake v. Cole,* 257 Iowa, 594, 133 N. W. 2d 714, 718 (1965). A judgment or final adjudication is not subject to collateral attack unless the Court was without jurisdiction. *Anderson v. Schwitzer,* 236 Iowa 765, 20 N. W. 2d 67, 71 (1945).

Furthermore, a collateral attack cannot be predicated on ". . . matters or issues which actually were, or which, with due diligence, could have been, presented or adjudicated in the original proceeding." *Gigilos v. Stavropoulos,* 204 N. W. 2d 619, 621 (Iowa 1973).

The Court in the Conservatorship proceeding prescribed notice by ordinary mail to the ward at her mailing address in Milo, Iowa at least five days prior to the hear-

ing. The Affidavit of Mailing established a presumption of mailing ten days prior to the hearing date. At the hearing, the Court found that notice had been given in accordance with the prior Court Order. Thus the issue of proper notice to the ward was clearly addressed and adjudicated by the Court and held to have been proper.

Appellant contends that the Court was without jurisdiction on the grounds that the ward may not have received notice of the sale of her property and thus was denied due process of law under the XIV Amendment. Absent an allegation or some evidence that the ward did not receive the notice, Appellant is precluded from raising a hypothetical question.

Furthermore, the notice prescribed by the Court in the Della Vanderlinden Conservatorship proceeding was reasonably calculated to apprise her of the sale proceeding and gave her an opportunity to be heard.

Absent a violation of due process, the Probate Court had personal jurisdiction over the ward to enter an order authorizing the sale. Therefore, the attack by the Appellant in the subsequent estate proceeding was clearly a collateral attack.

The Iowa Court of Appeals, having found that notice was proper and that the Probate Court had jurisdiction, correctly held that Appellant's attempt to impeach the judgment was a collateral attack.

The impermissability of collateral attack is a state procedural question without federal implication. The lack of a federal question precludes the Court from taking jurisdiction under 28 U. S. C. 1257 (c).

V.

In the event the Court finds that the Appellant's direct appeal is improper, and deems the appeal to be a petition for writ of certiorari, Appellee submits that certiorari should be denied.

Rule 17 of the Supreme Court Rules pertaining to Writs of Certiorari provides that such a Writ is not a matter of right but of judicial discretion. Furthermore, a Writ of Certiorari is only granted where there is a federal question which is special and important. As discussed in Argument IV, Appellee submits that Appellant has failed to raise a federal question and, therefore, certiorari should be denied for the same reasons that a direct appeal should be denied.

Appellee further submits that there is no federal question to address since the decision below was based on collateral attack, a non-federal question.

In addition, any decision handed down in this matter would have very limited applicability since the Iowa Probate Code regarding notice has been amended since the facts occurred underlying this case. Notice by ordinary mail, judicially sanctioned at the time of this case, has now been statutorily sanctioned. *Iowa Code* Section 633.40 (1973).

Furthermore, the question of whether the ward actually received the notice is a factual question resolved against Appellant in the lower courts.

Hence, not only does Appellant's appeal fail to generate a true federal question, but the appeal is without special merit and significant import.

CONCLUSION

For the reasons set forth herein, Appellee respectfully requests that Appellant's appeal be dismissed, or in the alternative, that the decision of the Iowa Court of Appeals, dated February 26, 1980 be affirmed.

Respectfully submitted,

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80-138

No. .....

In The

Supreme Court of the United States

October Term, 1980

DEAN VANDERLINDEN, EXECUTOR OF THE ESTATE OF W. F. VANDERLINDEN, DECEASED,

Appellant,

vs.

RICHARD VANDERLINDEN AND RICHARD VANDERLINDEN, EXECUTOR OF THE ESTATE OF AGATHA VANDERLINDEN, DECEASED,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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IV. Appellee's motion misstates the record. 7

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COMES NOW, the appellant, Dean Vanderlinden, Executor of the Estate of Della Vanderlinden, deceased, and hereby replies to appellee's Motion To Dismiss Or Affirm, stating as reasons therefore the following:

I. Appellant has properly challenged the validity of the state statute to warrant a direct appeal from the decision of the Iowa Supreme Court.

II. This appeal presents a justiciable case or controversy.

III. The notice procedure prescribed by the court in the Della Vanderlinden conservatorship proceedings violated due process of law.

IV. Appellee's motion misstates the record.

V. The Iowa Court of Appeals erred in deciding this case on the basis of collateral attack; and, moreover, such issue is not one independent from the Federal issue of violation of due process of law.

VI. In the event the court finds that an appeal pursuant to 28 U. S. C. Section 1257 (2) is improper, appellant states that writ of certiorari pursuant to Section 28 U. S. C. 1257 (3) should be granted.

———o———

ARGUMENT POINT I.

Appellant has properly challenged the validity of state statutes to warrant a direct appeal from the decision of the Iowa Court of Appeals.

Appellee has challenged the timeliness of the raising of the Federal question by appellant. This Court has long held that the proper time to assert a Federal ques-

tion is in the trial court, whether such be by pleadings, motion, exception or other action. *Mutual Life Insurance Company v. McGrew,* 188 U. S. 291, 23 S. Ct. 275, 47 L. Ed. 480 (1903). In this action, appellant raised the due process notice question relating to the Fourteenth Amendment of the Federal Constitution in a clear and timely fashion in a Motion For Summary Judgment made pursuant to Iowa Rule of Civil Procedure 237. This rule is based on the Federal Rule of Civil Procedure 56 governing summary judgments, and the Iowa courts have long held that the interpretation of the Federal rules are persuasive. *Sherwood v. Nissen,* 179 N. W. 2d 336 (Iowa 1970). The Iowa summary judgment rule, like the Federal one, permits the reviewing trial court to take into account certain facts beyond the pleadings including matters disclosed in discovery proceedings such as Answers to Request for Admissions, depositions and Answers to Interrogatories. *Brody v. Ruby,* 267 N. W. 2d 902 (Iowa 1978). In this action, the appellant utilized and relied on information obtained from all of these discovery devices in support of its Motion For Summary Judgment.

In making this Motion For Summary Judgment, the appellant urged to the trial court that Sections 633.40 and 633.389 as applied in giving notice to Della Vanderlinden violated the due process clause of the Fourteenth Amendment of the Federal Constitution. The trial court agreed that the method chosen violated due process provisions, but the Iowa Court of Appeals reversed this determination, finding the Iowa statutes valid both as enacted and as applied in this particular case in stating that the method used in providing notice complied with the due process standards previously established by this Court

in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 2d 865 (1950). Appellant had, of course, urged the trial court that the standards in *Mullane* were not met under the facts of this particular case.

This court has long held that when a state's statute is upheld as enacted and applied after a challenge based on a Federal constitutional ground, the right of appeal exists under 28 U. S. C. § 1257(2):

> *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979).
>
> *Huffman v. Pursue, Ltd.*, 420 U. S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482, Reh. Den. 421 U. S. 971, 95 S. Ct. 1969, 44 L. Ed. 2d 463 (1975).
>
> *Fiske v. Kansas*, 274 U. S. 380, 47 S. Ct. 655, 71 L. Ed. 1108 (1927).

A state court's upholding of a state statute on due process grounds was, in fact, the basis of appellate review in *Mullane, supra,* and succeeding cases, including *Schroeder v. City of New York*, 371 U. S. 208, 211 83 S. Ct. 279, 281-282, 9 L. Ed. 2d 255, 258 (1962).

In making argument to the trial court, appellant relied on the authority of *Flanders v. Waterloo Community School District*, 217 N. W. 2d 579 (1974). Although the case specifically dealt with notice of termination procedures of a public school district employee, appellant had relied on it for the language found at 582 of 217 N. W. 2d in which the Iowa Supreme Court stated a general rule that when a statute or other provision does not expressly authorize notice by publication, mail or some other specified method, but requires the person to notify in writing or give written notice, then the method of trans-

mitting the writing to the recipient is not important, but the receipt of the writing by the one to be notified is essential. Moreover, the probate statutes which are in question in this present an even stronger case for written notice than the statute involved in *Flanders* which merely provided for mailing of notice; in that, probate statutes in question provide for *service* of notice. That an affidavit of mailing does not provide proof of *service* is clearly set out in *Harrington v. City of Keokuk,* 258 Iowa 1043, 1049-1050, 141 N. W. 2d 633, 637-638 (1966).

Appellant also contends that the Iowa Court of Appeals made a retroactive determination that notice under Section 633.40 need not be in writing. All of the above grounds make an appeal under 28 U. S. C. § 1257 (2) proper.

ARGUMENT POINT II.

This appeal presents a justiciable case or controversy.

Appellee has contended that this appeal does not present a justiciable case or controversy as is required by the United States Constitution in Article III, Section 2. This entire argument is based on the faulty conclusion that the burden of proof of service upon the ward in question is a task that necessarily rested upon the appellant. Appellant would stress that the statute in question involved an issue of service of notice, rather than merely making of a notice and that before the probate court could obtain jurisdiction, proof of service having been made was essential. That the burden of showing such proof of service rests upon the party relying on such service is a general rule of American Jurisprudence. 66 C. J. S. *Notice,* Sect. 21 (a) at 674, 58 Am. Jur. 2d *Notice,*

Sect. 32 at 513. Without such finding of notice having been properly given, any judgment is void, being without due process of law. *In Re Estate of Roedell,* 253 Iowa 438, 443, 112 N. W. 2d 842, 845 (1962); *Gray v. Lukowski,* 241 N. W. 2d 35 (Iowa 1976). It is, and always has been, appellant's position that nothing in the record of the probate court indicates that a specific finding of notice having been given to Della Vanderlinden was ever made. A portion of the language previously quoted in prior point of argument in *Harrington v. City of Keokuk, supra,* clearly shows that an affidavit of mailing does not provide proof of service of notice when service is required.

The Iowa Court of Appeals applied the presumption that receipt of a mailed notice by relying on the case of *Roshek Realty Co. v. Roshek Bros. Co.,* 249 Iowa 349, 356, 87 N. W. 2d 8, 13 (1957). That case involved receipt of a notice of written demand for a rent as per requisite to the claim of forfeiture of a lease. The present case, however, involves *service* of a notice in a probate court proceeding in which there was no provision by statute for mailing of notice. These factual dissimilarities between *Roshek* and the present case would make *Roshek* inapplicable as an authoritative precedent.

Moreover, the facts in this case show that only W. F. Vanderlinden picked up mail at the post office box he shared with Della Vanderlinden. Therefore, the only presumption that could be applied here was that he, as an agent of Della Vanderlinden, received mail. *Schutz v. Jordan,* 141 U. S. 213, 11 S. Ct. 906, 35 L. Ed. 705 (1890).

ARGUMENT POINT III.

The notice procedure prescribed by the court in the Della Vanderlinden conservatorship proceedings violated due process of law.

It is appellant's first contention that notice by ordinary mail was not permitted under Section 633.40 of the Iowa Probate Code at the time notice was ordered to be made upon Della Vanderlinden. Appellee argues that prior to 1972 when the law was changed allowing such procedure that such a practice was both common and accepted; however, this does not mean that such practice was lawful. In fact, prior decisions of the Iowa courts have long held that unless otherwise provided by statute, the service of a notice must be personal. *Harrington v. City of Keokuk,* 258 Iowa 1043, 141 N. W. 2d 633 (1966).

Appellant also has contended that notice given by ordinary mail because of circumstances presented by the uncontradicted evidence in this case is not of a type when such circumstances are considered reasonably calculated to apprise Della Vanderlinden of the pendency of the sale proceedings as was required by *Mullane v. Central Hanover Bank & Trust Co.,* 239 U. S. 306 (1950). Appellant contended that Della Vanderlinden's lack of mobility combined with the fact that mail was received at a box in which her husband, the adverse party in the probate proceedings, usually and customarily picked up the mail, constituted such circumstances so that one actually intending to appraise her of the notice of probate proceedings would have to rely on personal service rather than providing for notice by ordinary mail. The trial court,

in making its ruling, found that such circumstances clearly showed that due process in this case was not met under the *Mullane* standards. For all of the foregoing reasons, the Fourteenth Amendment due process issue exists for this court to consider on appeal.

ARGUMENT POINT IV.

Appellee's motion misstates the record.

At this juncture, appellant feels that it is incumbent to point out to this court that the appellee has misstated the record by trying to interject matters that were never before the trial court at the time of hearing or contrary to the facts of the record. The first matter that must be noted is the absence in the record of a specific finding by the probate court that notice had been given to Della Vanderlinden. The second matter is that the trial court, in making its ruling, never had any evidence that Della Vanderlinden knew of the pendency of the sale of her farm. Appellee tried to raise this in a Motion To Reconsider, which is not provided for in Iowa Practice and Procedure, after the ruling on a Motion For Summary Judgment; and appellant strenuously objected to the same in its appellate Brief. The testimony of the Guardian ad Litem indicated that he never made any contact with Della Vanderlinden to ascertain that she had actually received notice, but merely signed forms provided for him by the attorney for the conservatorship. The Order, from the probate court, however, clearly provided that Della Vanderlinden herself, whose competency is undisputed, was to receive notice.

ARGUMENT POINT V.

The Iowa Court of Appeals erred in deciding this case on the basis of collateral attack; and, moreover, such issue is not one independent from the federal issue of violation of the due process of law.

Appellant contends that the Probate Court judgment was void and that the sale allowed thereby can be attacked at any time. *Rosenberg v. Jackson,* 247 N. W. 2d 216, 218 (Iowa 1976). Appellant's attack was based on due process grounds alleging deficient notice. The Iowa Court of Appeals first considered this issue in its opinion. Thereafter, it ruled that this action was a collateral attack. It seems clear that these issues are inherently and entirely interwoven in the broader framework of the Federal Constitutional question of due process of law. When the non-Federal ground is so interwoven with the Federal, this court's jurisdiction on appeal is plain. *Abie State Bank v. Bryan,* 282 U. S. 765, 51 S. Ct. 252, 75 L. Ed. 690 (1931).

ARGUMENT POINT VI.

In the event the court finds that an appeal pursuant to 28 U. S. C. Section 1257 (2) is improper, appellant states that writ of certiorari pursuant to Section 28 U. S. C. 1257 (3) should be granted.

The holding of the Iowa Court of Appeals allowing for notice other than in writing presents a question of special merit and significant import. Moreover, the statutory change allowing mailed notice does not moot the Fed-

eral question of due process of law so as to conclude review either by appeal or certiorari, for the reason that even if ordinary mail has been authorized is a method of providing notice in the statute at the time Della Vanderlinden was given notice that under the circumstances which had been established by uncontradicted evidence, that even compliance with such statute would not have reasonably apprised Della Vanderlinden of the pendency of these proceedings and such was known to W. F. Vanderlinden, the party giving notice to her. *Robinson v. Hanrahan*, 409 U. S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972).

CONCLUSION

For the reasons set forth herein and for the reasons previously stated in his Jurisdictional Statement, appellant respectfully requests that this court note probable jurisdiction of this appeal; or in the alternative, request the papers whereupon this appeal is taken to be regarded and looked upon as Petition For Writ of Certiorari.

Respectfully submitted,

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